

SUPREME COURT OF WISCONSIN
OFFICE OF LAWYER REGULATION

Public Reprimand With Consent

2005-OLR-5

Barbara A. Cadwell
Attorney at Law

The Respondent, Barbara A. Cadwell, 52, practices in White Lake, Wisconsin. This reprimand is based on the following conduct.

Respondent was appointed by State Public Defender (SPD) as appellate counsel for two different clients and the facts pertaining to each client are set forth separately.

Client #1 (L)

Respondent was appointed by the SPD as L's appellate counsel on February 28, 2003. On June 19, 2003 L sent a letter to the SPD informing them that he had not heard from Respondent, despite having sent Respondent two letters and having tried to call her.

By letter dated June 24, 2003, the Attorney Manager (Manager) for the Appellate Division of the SPD asked Respondent to respond to L's June 19, 2003 letter and send a copy of her response to the SPD. The Manager received no response from Respondent.

The Manager contacted Respondent by phone on August 7, 2003 and Respondent said she would send him a letter regarding the status of L's matter. In a letter received by the Manager on August 20, 2003, Respondent stated that she had made an appointment to meet with L prior to receiving the Manager's June 24, 2003 letter, that she had met with L, and that she was in the process of preparing a no merit report.

On September 15, 2003 the SPD received another letter from L stating that Respondent had not responded to three of his letters and that he was very worried about his appeal or post-conviction relief. L's September 15, 2003 letter enclosed a copy of a letter he had sent to Respondent outlining the reasons he believed he had a viable ineffective assistance of counsel claim.

After the Manager requested that she respond to L's September 15, 2003 letter, Respondent informed L, by letter dated September 17, 2003, that she was in the process of preparing a no merit report and explained why she believed there were no issues of arguable merit. Respondent's letter concluded with a statement that when her no merit report was completed, L would receive a copy of it and the court file, but Respondent did not explain the effect of a no merit report or that L would have an opportunity to respond to it.

Subsequently, the Manager received a copy of a September 22, 2003 letter from L to Respondent, in which L stated that he wished to proceed *pro se* and asked for his file and the transcripts in his case.

In a September 26, 2003 letter to L, the Manager explained that if a no merit report were filed, L would have an opportunity to respond to it. The letter further explained that L had the option of discharging Respondent and proceeding *pro se*, but then no other attorney would be appointed by the SPD to represent him.

In a letter to Respondent dated September 29, 2003, L stated:

i (sic) have read the letter that (the Manager) has sent me and i have decided i do want to go forward with the no merit-report please and i am sorry for any disruptions (sic) i may have caused, i was not on my medication that day and was not thinking clearly. so yes please i would like to proceed with the no merit report. please respond soon.

The deadline for filing the no merit report with the Court of Appeals (Court) was December 2, 2003.

On October 15, 2003, two weeks *after* L told her he wanted her to file a no merit report, Respondent closed her SPD file for L on SPD's online website. By letter dated October 17, 2003, Respondent informed the circuit court clerk that L wished to proceed *pro se*. By letter dated October 20, 2003, three weeks *after* L's September 29, 2003 letter stating that he wished to have Respondent file a no merit report, Respondent transmitted the transcripts and court file to L.

After receiving copies of Respondent's October 17 and 20, 2003 letters, the Manager wrote to Respondent on November 4, 2003 asking her if she had received L's September 29, 2003 letter, and enclosing a copy of it. The Manager's letter asked for a response stating whether L had changed his mind again after his September 29, 2003 letter. The Manager received no response from Respondent to his November 4, 2003 letter.

On November 13, 2003 the Manager received a letter from L stating that he had not heard from Respondent since he sent her his September 29, 2003 letter, except to receive the transcripts. L asked the Manager, "...should i (sic) send these transcripts back to Respondent so she can proceed with my no merit report?"

By letter dated November 25, 2003 and enclosing a copy of L's November 13, 2003 letter, the Manager asked Respondent to respond immediately to L and to him, explaining how she intended to fulfill her responsibilities to L since he clearly wanted her to file a no merit report and did not want her to withdraw.

In a December 1, 2003 letter to L, Respondent stated that she understood L now wanted her to file a no merit report and asked that L return the case materials to her.

In a February 19, 2004 letter, L told the Manager that he was still waiting to hear from Respondent and that he needed to know when the no merit report was due so he could gain access to the prison law library to prepare his response. The Manager forwarded L's letter to Respondent on February 23, 2004 and asked her to inform L when the report was due.

L wrote letters to Respondent on February 25, 2004 and March 12, 2004 asking for information about when the no merit report was due. Respondent did not respond to the Manager's February 23, 2004 letter or to L's two letters.

The Manager sent an April 13, 2004 letter to Respondent enclosing L's letters and asking that she immediately inform L and the SPD of when she intended to file the no merit report. The Manager received no response from Respondent.

On April 19, 2004, over four months after the December 2, 2003 deadline for filing the no merit report, Respondent filed with the Court a motion to extend the time for filing the report. In her affidavit in support of the motion, Respondent stated that L advised her that he wanted the court file and transcripts and wanted her to close her file on his case. She stated that she then closed her file and sent L the documents pursuant to his request. Respondent's affidavit further attested that:

L *subsequently* advised me that he had changed his mind and did in fact wish for me to file a no merit report, however, L did not return the court file and transcripts to me until after the due date of the no merit report, making it impossible for me to prepare a no merit report on a timely basis.

(Emphasis added)

On May 6, 2004, the Court denied Respondent's motion, stating, "The defendant's change of heart at this late date does not constitute good cause for granting the motion."

In a May 18, 2004 telephone conversation, L told the Manager that he had not heard from Respondent and did not know about the May 6, 2004 Court order.

On May 20, 2004, the Manager filed a motion with the Court to extend the time for filing a post-conviction motion or a notice of appeal on behalf of L. The Manager's motion stated Respondent's affidavit misrepresented the true sequence of events, and argued that the true facts did not support a conclusion that L had a "change of heart at this late date." The Manager pointed out that it was not L's fault that Respondent did not receive the transcripts from L until after the December 2, 2003 due date because Respondent had not requested them from him until December 1, 2003, despite the fact that L had asked her to file a no merit report two months previously.

The Court subsequently reversed its May 6, 2004 order, granted the Manager's motion for an extension, and the SPD appointed successor counsel.

With respect to the timing of the sequence of events, Respondent stated, in her initial response to the grievance, that while L first said he wanted her to file a no merit report,

He then changed his mind and indicated that he wished to proceed *pro se*. I provided him with the court file and transcripts. He then changed his mind and requested a no merit report. I indicated that I would have to have the court file and transcripts back if I were to prepare a no merit report. He sent me the transcripts back, but did not send back the court file. At that point I believe I hoped that he did not want me to proceed any further. I did not receive the court file until December 8, 2004, after the due date for the no merit report.

OLR then asked Respondent to file a supplemental response addressing the Manager's allegation that she sent L his file three weeks *after* he had recanted his intention to proceed *pro se* and asked her to file a no merit report. Additionally, OLR asked Respondent to address the issue of whether the statement in her affidavit to the Court that L changed his mind and asked her to file a no merit report subsequent to the time she provided him with the court file and transcripts was a misrepresentation.

In response to OLR's request for a supplemental response, Respondent stated that L "changed his mind several times regarding whether or not he wanted a no merit report."

Respondent further stated,

My statement to the Court of Appeals that I sent him his transcripts and court files during one of the periods he indicated he wished to proceed pro se was not a misrepresentation.

Client #2 (S)

Respondent was appointed by the SPD as S's appellate counsel on December 4, 2002. S wrote a May 23, 2003 letter to the SPD complaining that he had written several letters to Respondent which had gone unanswered and that Respondent had failed to show up for two scheduled visits with him without explanation or notification. By letter dated May 30, 2003, the Manager asked Respondent to respond to S's letter within ten days and send a copy of her response to the SPD. The Manager received no response from Respondent.

By letter dated June 28, 2003, S told the SPD that Respondent had met with him but he didn't think she was prepared and she gave him no information regarding the grounds for his appeal. Respondent and S agree that at their meeting in June 2003, Respondent said she would again review the transcripts and the discovery for possible issues of arguable merit. S states that Respondent told him "we would be speaking in the future after she had the opportunity to review discovery." In her response to OLR, Respondent stated that although she did not believe there were any issues of arguable merit, "I advised S that I would review the transcripts and discovery and the motions filed by his co-defendant before I made a final decision."

After receipt of S's June 28, 2003 letter, the Manager wrote to S on July 3, 2003 and explained S's various options, including that if a no merit report were filed, S would have an opportunity to respond to it. The letter further explained that L could discharge Respondent and

proceed *pro se*, but then no other attorney would be appointed by the SPD to represent him. By copy of the letter to Respondent, the Manager asked that she respond to S's letters so that the Manager could determine "whether further action is needed by our office." The Manager received no response from Respondent.

The Manager contacted Respondent by phone on August 7, 2003, and Respondent said she would send the Manager a letter regarding the status of S's matter. In a letter received by the Manager on August 20, 2003, Respondent stated that she was in the process of preparing a no merit report. Respondent did not send a copy of this letter to S.

By order dated September 11, 2003, the Court granted a motion made by Respondent to extend the time for filing the no merit report to November 1, 2003.

In a letter to Respondent dated October 8, 2003, S complained that Respondent never responded to any of his letters, and stated that he wanted to know what was going on with his case and "what direction you plan on taking (sic) it." On October 24, 2003, S wrote the SPD that he only found out that Respondent was planning to file a no merit report when he called her on October 22, 2003. S said Respondent told him that it "was not necessary for her to notify me" of her intention to file a no merit report.

By letter dated November 3, 2003, the Manager asked Respondent to respond with specificity to S's complaints, including S's assertions that she never responded to his letters, that she did not speak with S after her initial contact with him, and that she failed to inform S of her intent to file a no merit report until October 22, 2003, and failed to consult with him about her decision to do so. The Manager also asked Respondent for a copy of the no merit report, which he assumed she had filed since it had been due on November 1, 2003. Respondent did not respond to the Manager's November 3, 2003 letter.

In an order dated November 6, 2003, the Court noted that the time for filing a no merit report had elapsed and that the Court had received two letters from S. The Court ordered Respondent to respond regarding the status of the matter.

In response to the Court's November 6, 2003 order, Respondent stated that in an October 22, 2003 telephone conversation, S said he did not want her to file a no merit report and asked her to send him the court file and transcripts, which she did that day. Respondent said S called her the next day to say he did want her to file the no merit report after all, but she told him she could not because she had already sent him the case-related documents.

In a November 12, 2003 letter to the Manager, Respondent said that she believed S had terminated her services, and stated that she had advised S of upcoming deadlines and told S that he should request an extension from the Court. Respondent did not send a copy of her November 12, 2003 letter to S, nor did she offer to assist S in securing an extension.

The Court issued a November 18, 2003 order stating that, while Respondent believed S had terminated her services, S, according to letters he sent the Court, did not. The Court ordered Respondent to either file a motion to withdraw with the trial court or file a letter with the Court stating that she would represent S in a no merit report.

On November 24, 2003, Respondent filed a motion with the trial court to withdraw as S's attorney. The motion stated that S "initially indicated that he wished for me to file a no merit report," but then told her on October 22, 2003 that he did not want her to do so and asked her for his documents. The motion further stated that on October 23, 2003, S again called her and said he did want the no merit report after all, but Respondent advised the trial court that S had already terminated her representation and stated that the Court of Appeals had "directed that I file a motion to withdraw in this court."

In a December 2, 2003 letter response to Respondent's motion to withdraw, the Manager told the circuit court he did not believe S had waived his right to counsel, and argued that because Respondent was still the attorney of record she should not have allowed the Court of Appeals deadline to expire. Additionally, the Manager pointed out that the facts did not support Respondent's statement that S had initially asked her to file a no merit report, and that her statement that the Court of Appeals had "directed" her to file a motion to withdraw was not accurate because the Court had order her to *either* continue representing S *or* file a motion to withdraw. The trial court issued an order denying Respondent's request to withdraw.

Respondent obtained two additional extensions from the Court for filing the no merit report, with the second deadline being April 15, 2004. However, on February 26, 2004, Respondent filed with the circuit court another motion to withdraw, stating that S had recently asked her to again cease work on the no merit report. After first summarily granting Respondent's request, the circuit court vacated its order when it realized neither S nor the SPD had been given an opportunity to respond. After receiving their input, the court ultimately entered an order on May 17, 2004 permitting Respondent to withdraw because her relationship with S "has deteriorated to the point that it materially impairs S's representation," but not because S had waived his right to counsel. The Court subsequently granted the Manager's motion for an extension and the SPD appointed successor counsel.

Applicable Disciplinary Law

L's matter:

By informing L that she was in the process of preparing a no merit report without first consulting with L about that decision, Respondent violated SCR 20:1.2(a), which states, in part,

A lawyer shall abide by a client's decisions concerning the objectives of representation ...and shall consult with the client as to the means by which they are to be pursued.

By failing to timely file either a no merit report or a request for an extension in L's matter, and by failing to respond to numerous requests from the Manager about the status of the matter, Respondent violated SCR 20:1.3, which requires a lawyer to act with reasonable diligence and promptness in representing a client.

By failing to respond to numerous requests for information from L, including several letters, and by failing to notify L of the Court's May 6, 2004 order denying an extension, Respondent violated SCR 20:1.4(a), which states, "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information."

By failing to explain to L the effect of a no merit report and that he would have an opportunity to respond to it, Respondent violated SCR 20:1.4(b), which states, "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

By misrepresenting in her affidavit to the Court that L changed his mind and asked her to file a no merit report after she had already provided him with the court file and transcripts, and further, by misrepresenting that L's failure to return the documents until after the due date for the report was the cause of her failure to file the report on a timely basis, Respondent violated SCR 20:3.3(a)(1), which states, "A lawyer shall not knowingly make a false statement of fact or law to a tribunal."

By stating in her responses to OLR that L changed his mind and asked her to file a no merit report subsequent to the time she provided him with the court file and transcripts, by

stating that L changed his mind several times, and by stating that her statement to the Court was not a misrepresentation, Respondent violated SCR 22.03(6), which provides, in part, that in the course of an investigation a respondent's misrepresentation in a disclosure is misconduct.

S's matter

Respondent violated SCR 20:1.3 by failing to respond to numerous requests from the Manager about the status of S's matter and by failing to timely file either a no merit report or a request for an extension in S's matter.

Respondent violated SCR 20:1.4(a) by failing to respond to numerous requests for information from S, including several letters.

Respondent violated SCR 20:1.2(a) by failing to inform S of her intent to file a no merit report until October 22, 2003, just ten days before the report was due, and by failing to consult with S about that decision.

By stating to S on October 23, 2003 that her services had been terminated and she would not file a no merit report for him, and further, by telling S that the report was due on November 1, 2003 and placing the responsibility for seeking an extension on S, and by allowing the November 1, 2003 deadline to expire without seeking an extension for S, Respondent violated SCR 20:1.16(d), which states, in part,

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned...

By stating in her November 24, 2003 withdrawal motion in the trial court that S had initially asked her to file a no merit report, and by further stating in that motion that the Court of

Appeals had directed her to file a motion to withdraw with the trial court, Respondent violated SCR 20:3.3(a)(1).

Respondent has no prior discipline.

In accordance with SCR 22.09(3), Attorney Barbara A. Cadwell is hereby publicly reprimanded.

Dated this 4th day of September, 2005.

SUPREME COURT OF WISCONSIN

/s/
Curry First, Referee